No. 12,069

IN THE

United States Court of Appeals

For the Ninth Circuit

F. K. DENT,
Appellant,

vs.

ALASKA PLACER COMPANY,
Appellee.

REPLY BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

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I.

STATEMENT OF THE CASE.

Portions of the statement of the case by appellee are deserving of comment from a factual standpoint. I will comment on the statement in the order it appears on pages 2 to 5 of appellee's brief:

(a) In the opening paragraph defendant refers to the map of its proposed operations (R. 31) filed with the U. S. Engineers, War Department. It is significant that this map shows mining claims having different names from those in litigation here, yet covering the same ground! Defendant makes much of the history of plaintiff's locations, yet claims no prior locations. The obvious deductions are that de-

fendant's map shows mineral locations claimed by it, and that such locations are a re-staking, in part at least, of the ground claimed by plaintiff. The act was passed August 8, 1947, and the map (R. 31) and the request for War Department permit (R. 26) shows date of August 22, 1947. The law permits of but two mineral locations a month; so we can safely presume these claims were staked by defendant prior to the passage of the act.

(b) Defendant states (Brief 3) that plaintiff's claims appear to lie wholly within the bed of the river. We submit that defendant's map (R. 31), showing Melsing Creek and a scale, make it obvious from the descriptions of plaintiff's claims (R. 3-5) that this is not true.

(c) Defendant states that six of the persons at the miners meeting (Brief 5) are "directly interested in the pending suit." If the writer means to imply this action, they are certainly not parties. If she is intending to imply that they have an interest in the mining claims, then the fact is that defendant has gone to great lengths to prove that they *have not,* and have deeded all their interests to plaintiff. If it is her meaning of the word "interested" that these persons are "curious concerning" and "concerned about" the *decision* in this case, then the statement is correct. Each and every person in attendance at the miners meeting was as interested and concerned as plaintiff herein; and further, the result of this proceeding is as vital to them as to plaintiff. The de-

cision in this case more than affects the parties, it affects a large part of a large and vital industry.

(d) Defendant claims in its brief (p. 5) that its president refused to take part in the miners meeting. The record (R. 46) shows "a lengthy discussion followed", then on vote, that "The following members refused to vote *either for or against**: Ralph Loman, Warren Davis, Charley Gustavson." As defendant took the liberty of indulging in the presumption that Nels Swanberg, Jr., is the son of Nels Swanberg (a party in *U. S. v. Lucas* as administrator of the estate of a decedent), we indulge in the presumption that Ralph Loman, Warren Davis and Charley Gustavson were employees of defendant.

II.

ARGUMENT.

In reply to the argument of defendant we will first follow the outline presented in defendants brief (pp. 5-7).

(1) It is defendant's position that the denial of an injunction *pendente lite* is a discretionary matter not reviewable except if improvidently exercised. With this statement of the law we have no quarrel, nor do we dispute the sound reasoning of the cases in that respect cited by counsel. However, this proceeding is one to try title to real property, property ex-

*Emphasis in this brief is that of the writer.

hausted by the mining of defendant. The injury is an irreparable one to an estate of plaintiff; and injunctive relief essentially an ancillary remedy to preserve the *status quo* while title is being tried. The well-founded principles of granting such relief are well stated in this court's opinion in *Wasky v. McNaught* (9th Cir., 1909) 163 Fed. 929 an appeal from Alaska in an ejectment case on mining claims. The Court therein stated the case thusly:

> "The plaintiffs brought this suit in ejectment to recover the possession of a portion of a mining claim which the defendants had entered and ousted the plaintiffs. The value of the ground in controversy consists in the gold-bearing earth, sand and gravel contained therein. The defendants admit they are severing and extracting this gold-bearing material and depositing it in a dump on the premises. *The extraction and removal of this gold-bearing material from the ground will necessarily destroy its value and render ineffectual any judgment that may be obtained in the ejectment suit for the possession of the ground.* The plaintiffs, to protect their interests in this respect, have appealed to the remedy by injunction."

In referring to the interpretation of the New York statutes from which the provisions in Alaska were drawn, this Court in the same case further said:

> " 'The subject of the action' is the mining ground *in controversy* and the mineral therein contained, and the injunction is for the purpose of preventing the removal of the mineral, which constitutes the value of the mining ground, and which it is the right of the plaintiffs to have preserved. If

> it be true, as alleged in the complaint in ejectment, that the plaintiffs are the owners of the ground, it would certainly be in violation of their rights 'respecting the subject of the action' for the defendants to destroy the estate by removing its value." * * *
>
> "The essential value of the injunction in this case is to prevent further irreparable damage *pending the determination of the legal rights of the parties to this ground.*"

We do not hold that the Court has no discretion. If in a case title depended on several factual issues upon which evidence was conflicting, and it appeared doubtful that the moving party would be successful the Court could deny injunctive relief *pendente lite;* and such an order would be sustained on appeal.

But, where the facts are not in controversy, as here; where defendants are, factually, interlopers claiming no title (title in the sense of exclusive right of possession); and factually where the plaintiff's right to exclusive possession stands or falls on the interpretation of a statute, the matter is not discretionary. The District Court did not "exercise discretion" in denying the injunction, or "improvidently exercise" his right: The injunction was *denied solely because the Court interpreted the law to mean plaintiff had no right that defendant violated.* We are not here, therefore, to review whether the Court "improvidently exercised discretion", but to determine whether, under the clear state of facts, the law granted to plaintiff an exclusive right of possession.

(2) Defendant next contends in its brief (p. 10) that it has never been the intent of Congress by the General Mining Laws, or special acts for Alaska, to *grant rights to the beds of navigable streams.* This statement, for the period prior to the act of August 8, 1947, is correct, and one with which we have no quarrel.

I am unable to follow the reasoning in (2) (b) and (c) of defendant's brief, or to understand the applicability thereof to this case (pp. 13-16). We are not here involved with the *general* mining laws of the United States, or any of the *general* rules applicable to mining claims, or the rights of miners *in general* to make rules or initiate rights. We are concerned only with the act of August 8, 1947, and its interpretation; for which we look to the act itself and to the *similar special acts* relating to the Bering Sea, and later the Alaska Coastal tidelands, and shoals, and the application of these acts in custom and usage both before and after adoption.

I think the fundamental misconception of defendant is the following expression on page 16 of appellee's brief:

> "(3) It was not the intent of Congress by the Act of August 8, 1947, to confer either title or possessory right of any kind to the beds of navigable streams in Alaska."

It was certainly not the intent of Congress to convey title in the sense of a defeasance from the United States. This act, like its predecessors, applied to areas

not a part of the public domain, and consequently not subject to *purchase under the laws relating to patent.* That such was not said in so many words in prior acts does not add to the specific proviso in that regard in the last act. The expectancy of early statehood for Alaska, within the probable life of mining operations anticipated under the act, made it advisable, and praiseworthy, for Congress to caution that the fee of such lands could not be acquired, would be transferred to the state when created, and that

> "Any *right* or privileges acquired hereunder * * * shall be terminable by such state, and the said mining operations shall be subject to the laws of such state." (Act August 8, 1947.)

We submit that such would follow as a matter of course; and the significance of the enactment is the warning thereby given.

However, the intent of Congress to grant possessory rights could hardly be more clearly stated:

> "* * * shall be subject to exploration and mining * * * under * * * rules * * * *governing the temporary possession thereof.*" (Act August 8, 1947.)

Not being able to acquire the fee it follows that the only estate acquirable was the right of temporary possession. Defendant blandly ignores this provision of the act, *and our claim of right thereunder* (stigmatizing my use of the word "title" as a claim to the "fee"), reason that miners have no rule making authority, and that if they do, regulations by the Secretary of Interior supersede them. They even

reason that since the Department of Interior has *sole jurisdiction over tidelands* (Brief 19) Congress had no authority to give rule power to miners by the act of August 8, 1947! And even if it did, such power could be nullified by department regulations. Further (4b, Brief 20) the department rules had the *force and effect of law* (on a level equal to an Act of Congress we presume), so were, when made, law that, *by virtue of touching the subject* forever barred miners from adopting rules in accordance with the statute.

Beside the obvious fallacies of such reasoning stands the clear language of the act:

> *First.* The Secretary of Interior may make *general rules and regulations* for the preservation of order and the prevention of injury to fisheries. *And nothing more!* Any rule or regulation of the Secretary that is *not general in its application,* and is not founded on the preservation of order or the protection of fisheries is a nullity. It would mean absolutely nothing and could be completely disregarded with impunity.
>
> *Second.* The right of temporary possession is such as may be set up by reasonable rules and regulations of miners, heretofore or hereafter made. Any rule or regulation by miners not reasonable, or not founded on settling rights of temporary possession would be a nullity. Miners have no right by rule to protect fisheries. Conversely, the Secretary has no right by rule to control temporary possession. The two powers complement

each other, but are distinctly separate; and one mining or proposing to mine would be compelled to observe the proper regulations of each.

That the Secretary of Interior recognizes this to be true is obvious from his regulations. (R. 33-37.) After citing that the act permits mining

"* * * subject to certain conditions."

the regulations then say (Sec. 69.12):

"It is the purpose of Section 69.12 to 69.18, inclusive, to set forth the *conditions* under which exploration and *mining operations* shall be conducted."

Nowhere in the regulations is exploration controlled. Section 69.13 requires the filing of a notice of intent to mine

"* * * *before commencing actual mining operations* * * *"

Section 69.14 says

"In order to assure the preservation of order and the avoidance of conflict, *each dredge* * * * shall not be interfered with * * *".

Section 69.15 provides for *dredge locations* so as not to block navigation.

Section 69.16 requires observance of the laws for the protection of fisheries.

Sections 69.17 to 69.18 merely re-state parts of the act, and the effective date of the regulations.

Nowhere in the regulations does the Secretary encroach on the right of miners by rule to govern rights of temporary possession.

We are astounded at counsel's charge in part (5) (Brief 21) of bad faith on the part of plaintiff. Out of fairness to counsel preparing the brief I am compelled to say that she has not been completely informed. The record shows that plaintiff acquired these claims when defendant's predecessors were stopped from mining them by *U. S. v. Lucas,* but does not show he tried to mine the *claims in contravention of the court's judgment.* He didn't. The Memorial of the Territorial Legislature (appendix appellant's brief) and the Act of August 8, 1947, speak for the activity of plaintiff. From *U. S. v. Lucas,* and the resumption of mining by defendant about September 15, 1947, it appears that defendant's dredge had been setting nearby during the interim! So defendant jumped the ground, saying: "This is no longer yours, it belongs to all." Meanwhile plaintiff's dredge is many miles away, can only be moved in the winter, and then only at a cost of $25,000 or $30,000. Defendant's dredge operated about 20 days in 1947 (R. 10), then shut down for winter. Mining is closed in that area from about October 1 to near June 15 of the following year. What happened between plaintiff and defendant over the winter in their Seattle offices is not revealed in the record. The record does show that this action was commenced as quickly as prudent preparation could be had after mining was resumed in 1948.

While defendant's conduct may be in keeping with certain views on business ethics, it is hardly in a position to complain that plaintiff's appeal to the courts is an act "in defiance of the law".

In part (7) of her brief (p. 23) counsel for defendant claims plaintiff *and the trial Court* knew defendant had filed a Notice of Intent to mine! The Court could only have known it by private investigation of the Land Office records; and had it made such an investigation the same records would have disclosed plaintiff's notice! We could have produced that record below; and we could follow defendant's enlargement of the record by placing it in appendix to this brief. (R. 52-54.) However, we fail to see any effect in such a notice.

Defendant would have us believe that it was Congressional design that no exclusive temporary possession rights be granted, as that would *best promote mining!* This is fantastically absurd. Defendant's own record shows that in 20 days in 1947, and less than 60 days in 1948 he mined through approximately five claims, or 6600 feet (complaint, answer and map on R. 31), and claims (R. 41) that it must mine a full season to have any fair chance of making a profit. The map shows the stream to be hardly wide enough for two dredges. What would defendant do if plaintiff planted his dredge 500 feet in front of that of defendant? What then would be the economy of its operations, and its "reasonably fair chance of making a profit?" What a sweet race down the paystreak that

would be. And what a great loss in side economic dredge limits, a permanent loss to the country of a natural resource.

It is impossible to place a drag-line outfit, or small second-hand bucket dredge outfit on any stream in Alaska, ready to mine, for under $90,000. It takes good ground, better than 50 cents a yard, to average $1,000 daily; and the average season is 100 days. Operating costs will run about 80% of gross; so it is obvious even a small outfit *must have five seasons operations to return the investment.* Can such be economically justified where there can be no exclusive right of possession to more than an area 200 feet by 500 feet? (R. 34-35.) That is hardly ten days mining. And this is but an illustration of a peanut-sized outfit, capable only of handling high-grade shallow ground.

III.

CONCLUSION.

One cannot help but be struck by the record made by defendant with the affidavits of Ralph Loman, and by the brief of counsel, but that every possible subterfuge, innuendo and accusation is used, with full stops and play on passion, to divert the attention of the Court from the fundamental issue. I have noticed that such tendencies by parties and their counsel generally conceal an abiding fear of open discussion of the pertinent issue.

The position of appellant is made plain in his opening brief. Congress by the Act of August 8, 1947, permitted exclusive rights of temporary possession to be acquired, *not under the general mining laws,* but under the rules of miners, *"heretofore or hereafter"* adopted. Do the locations of plaintiff qualify for that right?

We think there can be no question under the act but that miners can make rules—and that claims staked, or "perfected" in accordance with such rules can carry the right of possession. Also, the Territorial Legislature under the act could have superseded miners rules by legislative acts specifying what must be done to secure the right of temporary possession, compliance with which would perfect the right.

But here the facts are *that irrespective of the validity thereof* plaintiff, and many others in Alaska, claimed mineral deposits in navigable streams *on* August 8, 1947, and recognized such rights as between themselves; such claims by *custom and usage* being initiated and held in the same manner as those on the public lands. Had there been miners' rules "heretofore made" there is every reason to believe that they would have stated this custom. Could then there have been any doubt as to plaintiff's right instantly upon passage of the act of August 8, 1947?

Let us not let the decision in *U. S. v. Lucas* blind our eyes. That decision does not mean the Niukluk River upstream from Council may not be declared navigable. Upstream off the mouth of Ophir Creek where defendant's dredge operated for many seasons; and

upstream some 14 miles where there is a dredge at Camp Creek sometimes operated by plaintiff. If the stream be not navigable compliance with the general mining laws is sufficient. But until tested in Court or in a proceeding toward patent, who is to know? Is it not wise that the same practices that initiate and hold claims on the public domain apply as well, by custom and usage, to the streams and rivers of Alaska? With this there can be no quarrel. We submit that Congress, by the Act of August 8, 1947, in opening navigable rivers in Alaska to mining, used language susceptible to no other construction than an affirmation of rights of temporary possession acquired then, or later acquired, in accordance with miners' rules or custom then existing, or thereafter made.

Dated, Fairbanks, Alaska,
June 27, 1949.

Respectfully submitted,
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